

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

7 TROY L. MAJOR,)
8 Plaintiff,) No. CV-07-0318-CI
9 v.)
10 MICHAEL J. ASTRUE, Commissioner) ORDER DENYING PLAINTIFF'S
11 of Social Security,) MOTION FOR SUMMARY JUDGMENT
12 Defendant.) AND DIRECTING ENTRY OF
) JUDGMENT FOR DEFENDANT
)
)
)

Before the court are cross-Motions for Summary Judgment. (Ct. Recs. 12, 16.) Attorney Maureen J. Rosette represents the Plaintiff. Special Assistant United States Attorney Richard Rodriguez represents the Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 19.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment and **GRANTS** Defendant's Motion for Summary Judgment.

JURISDICTION

Troy Major (Plaintiff), protectively filed for a period of disability and disability insurance benefits (DIB) and Supplemental Security Income benefits on December 20, 2004. (Tr. 78.) He alleged disability due a knee injury, with an alleged onset date of October 2003. (Tr. 57, 183.) His application was denied both initially and upon reconsideration. (Tr. 57.) He timely requested a hearing,

1 which was held on September 11, 2006, before Administrative Law
 2 Judge Richard Say. (Tr. 180.) No testimony was taken. The
 3 hearing was continued to November 8, 2006, so Plaintiff could retain
 4 counsel. (Tr. 190.) Plaintiff, who was represented by counsel, lay
 5 witness Margaret Dean and vocational expert Jill Dempsey testified
 6 at the second hearing. (Tr. 189.) The ALJ denied Plaintiff's
 7 application and the Appeals Council denied review, making the ALJ's
 8 decision the final decision of the Commissioner. (Tr. 5-7.) The
 9 instant matter is before the district court pursuant to 42 U.S.C. §
 10 405(g).

11 STANDARD OF REVIEW

12 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
 13 court set out the standard of review:

14 A district court's order upholding the Commissioner's
 15 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
 16 Commissioner may be reversed only if it is not supported
 17 by substantial evidence or if it is based on legal error.
Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999).
 18 Substantial evidence is defined as being more than a mere
 19 scintilla, but less than a preponderance. *Id.* at 1098. Put
 20 another way, substantial evidence is such relevant
 21 evidence as a reasonable mind might accept as adequate to
 22 support a conclusion. *Richardson v. Perales*, 402 U.S.
 389, 401 (1971). If the evidence is susceptible to more
 23 than one rational interpretation, the court may not
 24 substitute its judgment for that of the Commissioner.
Tackett, 180 F.3d at 1097; *Morgan v. Commissioner of*
Social. Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999).

25 The ALJ is responsible for determining credibility,
 26 resolving conflicts in medical testimony, and resolving
 27 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 28 Cir. 1995). The ALJ's determinations of law are reviewed
de novo, although deference is owed to a reasonable
 construction of the applicable statutes. *McNatt v. Apfel*,
 201 F.3d 1084, 1087 (9th Cir. 2000).

29 SEQUENTIAL EVALUATION

30 The Social Security Act defines "disability" as the "inability

1 to engage in any substantial gainful activity by reason of any
 2 medically determinable physical or mental impairment which can be
 3 expected to result in death or which has lasted or can be expected
 4 to last for a continuous period of not less than 12 months." 42
 5 U.S.C. § 423(d)(1)(A). The Commissioner is governed by a five-step
 6 sequential evaluation process for determining whether a plaintiff is
 7 disabled. 20 C.F.R. §§ 404.1520, 416.920, *Bowen v. Yuckert*, 482
 8 U.S. 137, 140-42 (1987). As explained by the court in *Edlund*:

9 In evaluating whether a claimant suffers from a
 10 disability, an ALJ must apply a five-step sequential
 11 inquiry addressing both components of the definition,
 12 until a question is answered affirmatively or negatively
 13 in such a way that an ultimate determination can be made.
 14 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
 15 claimant bears the burden of proving that [s]he is
 16 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
 17 1999). This requires the presentation of "complete and
 18 detailed objective medical reports of h[is] condition from
 19 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
 20 404.1512(a)-(b), 404.1513(d)).

21

22 *Edlund*, 253 F.3d at 1156-1157.

23 The initial burden of proof rests upon the claimant to
 24 establish a *prima facie* case of entitlement to disability benefits.
 25 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971). This burden
 26 is met once a claimant establishes that a physical or mental
 27 impairment prevents her from engaging in her previous occupation.
 28 In steps one through four, a claimant must demonstrate a severe
 29 impairment and an inability to perform past work. *Erickson v.*
Shalala, 9 F.3d 813, 816-17 (9th Cir. 1993). If a claimant meets
 30 those requirements, the burden shifts to the Commissioner to
 31 demonstrate a claimant can engage in other types of substantial
 32 gainful work which exist in the national economy. *Id.* at 817
 33 (citing *Gallant v. Heckler*, 753 F.2d 1450, 1452 (9th Cir. 1984))).

1 To make this determination, the Commissioner must consider a
2 claimant's age, education, and work experience. 20 C.F.R. §
3 404.1520(a)(v). *See Bowen v. Yuckert*, 482 U.S. 137, 107 S.Ct. 2287
4 (1987).

5 It is the role of the trier of fact, not this court, to resolve
6 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
7 supports more than one rational impairment, the court may not
8 substitute its judgment for that of the Commissioner. *Tackett*, 180
9 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
10 If there is substantial evidence to support the administrative
11 findings, or if there is conflicting evidence that will support a
12 finding of either disability or non-disability, the finding of the
13 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
14 1230 (9th Cir. 1987). Nevertheless, a decision supported by
15 substantial evidence will be set aside if the proper legal standards
16 were not applied in weighing the evidence and making the decision.
17 *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432, 433
18 (9th Cir. 1988).

19 **STATEMENT OF THE CASE**

20 Detailed facts of the case are set forth in the transcript of
21 proceedings and the ALJ's decision and are briefly summarized here.
22 Plaintiff was 48 at the time of the hearing, had an 11th grade
23 education and no high school equivalency degree. (Tr. 192-93.) He
24 was not married and lived in a house with a friend and her two
25 children. (Tr. 193.) He testified he could read, write and do
26 math. (Tr. 194.) He stated he became disabled on October 1, 2003,
27 due to a knee injury. He also testified he suffered from high blood
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1 pressure which caused headaches, for which he was taking medication.
2 (Tr. 194-95.) He stated new medication made the headaches milder.
3 (Tr. 201.) He testified he could lift 10-15 pounds, could sit for
4 about a half-hour to 45 minutes before he had to stretch his legs,
5 could stand for about five to ten minutes, and walk a block or two
6 before having to rest. He stated he could climb a flight of stairs
7 slowly. (Tr. 199.) He testified he had not received treatment for
8 his knee because he did not have medical insurance. He stated he is
9 a recovering alcoholic and had been clean and sober for two and one-
10 half years. (Tr. 200.) He also stated he has headaches three or
11 four times a week and no energy. (Tr. 201-02.) He had past work
12 experience as a newspaper delivery driver, stock clerk, cleaner,
13 housekeeper, and cashier. (Tr. 209-10.) He testified he stopped
14 working because he hurt his knee while playing basketball. (Tr.
15 194.)

ADMINISTRATIVE DECISION

17 At step one, ALJ Say found Plaintiff had not engaged in
18 substantial gainful activity since the onset of the disability.
19 (Tr. 15.) At step two, he found Plaintiff's left knee injury was a
20 severe impairment and his medically documented conditions of prior
21 fractures, alcohol abuse, hypertension and headaches were non-
22 severe. (Tr. 16.) At step three, the ALJ found Plaintiff's
23 impairments or combination of impairments did not meet or medically
24 equal one of the listed impairments in 20 C.F.R. Part 404, Subpart
25 P, Appendix 1 (Listings). (Tr. 17.) At step four, the ALJ
26 determined Plaintiff could perform work at the sedentary exertional
27 level, and retained the residual functional capacity (RFC) to:
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1 [L]ift and/or carry and push and/or pull less than 10
 2 pounds frequently and up to 10 pounds occasionally; sit
 3 for up to 6 hours in an 8 hour day with normal breaks;
 4 stand and/or walk up to 2 hours in an 8 hour day with
 5 normal breaks; handle and finger frequently; avoid ladders
 6 and driving; and, perform occasional stooping, crouching,
 7 crawling, kneeling, balancing, climbing stairs and use of
 8 foot pedals.
 9

10 (Tr. 17.)

11 The ALJ found that Plaintiff's statements concerning the
 12 limiting effects of his impairments were not entirely credible, but
 13 that his testimony supported the assessed RFC for sedentary work.

14 (Tr. 18-19.) Considering vocational expert testimony, the ALJ
 15 determined Plaintiff was unable to perform past relevant work.

16 Proceeding to step five, the ALJ considered the Medical-Vocational
 17 Guidelines (Grids) and vocational expert testimony, and found
 18 Plaintiff could perform other work in the national economy. He
 19 concluded Plaintiff had not been under a disability, as defined by
 20 the Social Security Act, through the date of the decision. (Tr. 20-
 21.)

18 ISSUES

19 The question presented is whether the ALJ's decision is
 20 supported by substantial evidence and is free of legal error.
 21 Plaintiff argues that the ALJ erred when he: (1) improperly rejected
 22 Plaintiff's subjective symptom complaints; (2) presented an
 23 inaccurate hypothetical to the vocational expert; (3) made his RFC
 24 determination. (Ct. Rec. 13.)

25 DISCUSSION

26 A. Credibility

27 In *Fair v. Bowen*, 885 F.2d 597 (9th Cir. 2001), the Ninth

1 Circuit discussed a claimant's burden of presenting "objective
 2 medical evidence establishing an impairment" in disability
 3 proceedings:

4 This is a threshold requirement that cannot be overlooked.
 5 Our pain cases interpret a statute that provides: "An
 6 individual's statement as to pain or other symptoms shall
 7 not alone be conclusive evidence of disability as defined
 8 in this section; there must be medical signs and findings
 . . . which show the existence of a medical impairment .
 . . which could reasonably be expected to produce the pain
 or other symptoms alleged." 42 U.S.C. §423(d)(5)(A)
 (Supp.V 1987). See *Swenson v. Sullivan*, 876 F.2d 683, 687
 & n. 2 (9th Cir. 1989).

9
 10 *Fair*, 885 F.2d at 601-02.

11 As stated in the Regulations, because an impairment cannot be
 12 established by a claimant's statement of symptoms alone, the lack of
 13 evidence indicating anatomical, physiological or psychological
 14 abnormalities by "medically acceptable clinical and laboratory
 15 diagnostic techniques" precludes a finding that a claimant is unable
 16 to perform work due to the alleged symptoms. 20 C.F.R. §§ 404.1508,
 17 416.908.

18 Evidence of a medical provider's efforts to evaluate and treat
 19 a claimant is not sufficient to establish an impairment. *Ukolov v.*
 20 *Barnhart*, 420 F.3d 1002, 1005 (9th Cir. 2005). In *Ukolov*, the court
 21 held that a claimant's own perception of an impairment,
 22 "unaccompanied by a diagnosis or finding of impairment does not and
 23 cannot establish the existence of a disability." *Id.* at 1006. A
 24 medical opinion sufficient to establish an impairment must include
 25 "'symptoms [and a] diagnosis.'" *Id.* (quoting *Social Security Ruling*
 26 (*SSR*) 96-4p.)

27 Once there is evidence of a medically determinable impairment
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1 likely to cause alleged symptoms, the ALJ must provide specific and
2 cogent reasons for rejecting a claimant's subjective complaints.
3 *Bunnell v. Sullivan*, 947 F.2d 341, 346 (9th Cir. 1991). When an ALJ
4 finds the claimant's testimony as to the severity of symptoms is
5 unreliable, the ALJ must make a credibility determination with
6 findings sufficiently specific to permit the court to conclude the
7 ALJ did not arbitrarily discredit claimant's testimony. *Thomas v.*
8 *Barnhart*, 278 F.3d 947, 958-959 (9th Cir. 2002). Further, where
9 medical evidence of an impairment is presented, the lack of
10 objective medical evidence to corroborate severity is only one
11 factor considered by the Commissioner. *Bunnell*, 947 F.3d at 345.
12 In addition to the "ordinary techniques of credibility evaluation,"
13 the following factors also may be considered: (1) the claimant's
14 reputation for truthfulness; (2) inconsistencies in the claimant's
15 testimony or between his testimony and his conduct; (3) claimant's
16 daily living activities; (4) claimant's work record; and (5)
17 testimony from physicians or third parties concerning the nature,
18 severity, and effect of claimant's condition. *Id.*; see also *Thomas*,
19 278 F.3d at 958.

20 In the absence of affirmative evidence of malingering, the
21 ALJ's reasons for rejecting a claimant's subjective complaints must
22 be "clear and convincing." *Lingenfelter v. Astrue*, 504 F.3d 1028,
23 1038-39 (9th Cir. 2007); *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th
24 Cir. 2001); *Morgan*, 169 F.3d at 599. The ALJ "must specifically
25 identify the testimony she or he finds not to be credible and must
26 explain what evidence undermines the testimony." *Holohan v.*
27 *Massanari*, 246 F.3d 1195, 1208 (9th Cir. 2001) (citation omitted).
28

1 "[Q]uestions of credibility and resolutions of conflicts in the
 2 testimony are functions solely of the Secretary." *Sample v.*
 3 *Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982) (quoting *Waters v.*
 4 *Gardner*, 452 F.2d 855 n.7 (9th Cir. 1971)).

5 Here, the ALJ found Plaintiff's left knee injury was a severe
 6 impairment that could reasonably cause the Plaintiff's alleged
 7 symptoms, but imaging reports and the medical evidence as a whole
 8 did not support Plaintiff's statements regarding the severity of
 9 limitations caused by his knee condition. (Tr. 18-19, .) Medical
 10 evidence is properly considered during a credibility assessment, but
 11 cannot be the sole reason for rejecting a claimant's testimony.
 12 *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001). In addition
 13 to lack of objective medical evidence support, the ALJ found
 14 Plaintiff's testimony was not consistent with the observations by
 15 examining Dr. Shanks in December 2004, who stated Plaintiff was able
 16 to perform light to medium exertional level work with no heavy
 17 lifting or squatting, (Tr. 16, 18, 131-33), and treating Dr.
 18 Mueller's opinions in August 2005 and August 2006, that Plaintiff
 19 could still perform light work. Dr. Mueller also observed that
 20 recent imaging reports did not explain the degree of pain claimed,
 21 casting doubt on the reliability of Plaintiff's self-report. (Tr.
 22 16, 18-19, 146-49, 161-63.)

23 An ALJ does not have to reject a claimant's testimony in its
 24 entirety. *SSR 96-7*. Here, the ALJ credited Plaintiff's hearing
 25 testimony that he could lift up to 15 pounds, sit for 30 to 45
 26 minutes before having to stretch, stand 5 to 10 minutes and walk one
 27 to 2 blocks. (Tr. 18, 199.) This testimony is consistent with the
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1 ALJ's finding that Plaintiff was capable of sedentary work ¹ with
 2 normal breaks, avoidance of driving and ladders, and limitations on
 3 bending, squatting, kneeling, stooping, etc. (Tr. 17, 211-12.)

4 Regarding Plaintiff's alleged symptoms of headache and fatigue,
 5 the ALJ found no medical evidence of limitations due to high blood
 6 pressure or headaches in the record. (Tr. 19.) He found
 7 Plaintiff's statements at the hearing were not consistent with
 8 clinical notes, which contained "no complaints of fatigue or lack of
 9 energy." (*Id.*) A Plaintiff's statements alone cannot establish an
 10 impairment. The evidence supports this legally sufficient reason
 11 for discounting Plaintiff's testimony.² (Tr. 150-53, 157, 160,
 12 161.)

13 Finally, the ALJ "may draw inferences logically flowing from
 14 the evidence." *Sample*, 694 F.2d at 642. In support of his
 15 credibility determination, the ALJ reasoned Plaintiff's condition
 16 was not sufficiently limiting to entitle him to public assistance
 17 from other agencies. (Tr. 19.) Decisions from other agencies are
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19 ¹ Sedentary work involves lifting no more than 10 pounds at a
 20 time, occasionally lifting small articles or tools, standing and
 21 walking occasionally. Typically, sedentary jobs are performed in a
 22 seated position with no significant stooping, and require good use
 23 of the hands and fingers. *SSR* 83-10.

24 ² Because the medical record contains no medical evidence that
 25 Plaintiff's high blood pressure and headaches caused more than "a
 26 minimal effect" on Plaintiff's ability to perform work, the ALJ did
 27 not err in finding these conditions were non-severe at step two.
 28 *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988).

1 considered properly by the Commissioner in evaluating medical
2 evidence. See SSR 06-03p (other agency decisions may provide
3 insight into a claimant's impairments and degree of disability).
4 If the evidence supports more than one rational interpretation, the
5 Commissioner's determination must be upheld. *Sample*, 694 F.2d at
6 642. The ALJ properly addressed Plaintiff's symptom testimony and
7 gave "clear and convincing" reasons for partially discounting
8 Plaintiff's subjective symptom statements.

9 **B. Hypothetical Question**

10 Plaintiff claims the ALJ erred when he posed a hypothetical
11 question to the vocational expert that did not reflect the ALJ's
12 final RFC determination of a sedentary exertional level.
13 Specifically, he argues that the vocational expert responded to a
14 hypothetical individual who could lift 10 pounds frequently and 20
15 pounds occasionally, rather than the 10 pound limitation for
16 sedentary work. (Ct. Rec. 13 at 10.) While it is true that the
17 ALJ's first hypothetical included some "light" exertional levels,
18 and the final RFC determination was an ability to perform
19 "sedentary" work, the Regulations dictate that when a person can
20 perform light work, she or he can also perform sedentary work. 20
21 C.F.R. §§ 404.1567 (b), 416.067 (b). Further, the record clearly
22 shows that the ALJ properly refined his hypothetical to the
23 vocational expert by specifying the individual was "limited to
24 sedentary activities primarily because of his limitations in
25 standing and walking. He can probably lift at the light exertional
26 level." (Tr. 210.) See *Distasio v. Shalala*, 47 F.3d 348, 350 (9th
27 Cir. 1995) (vocational expert can opine whether particular claimant
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1 can perform jobs between two exertional levels); see also SSR 83-14
 2 (evaluating combinations of exertional and nonexertional
 3 limitations). The vocational expert specifically opined a person
 4 who could perform the limited light level propounded, could also
 5 perform certain sedentary jobs within the national economy,
 6 including assembler, surveillance system monitor, and order clerk.
 7 (Tr. 211-12.)

8 In addition, when asked by the ALJ whether there were jobs
 9 available if Plaintiff's testimony were credited, the vocational
 10 expert opined, "[O]ther than his napping and low energy, the other
 11 criteria [Plaintiff] outlined would likely, those [sedentary] jobs
 12 that I quoted would likely be doable." (Tr. 212.) As discussed
 13 above, the ALJ properly rejected the Plaintiff's testimony regarding
 14 the severity of headaches and fatigue. Therefore, the two
 15 hypotheticals presented by the ALJ to the vocational expert at step
 16 five were "accurate, detailed and supported by the medical record"
 17 in its entirety. *Tackett*, 180 F.3d at 1101. The ALJ properly
 18 relied on the vocational expert testimony and the Commissioner met
 19 his burden at step five.

20 **C. Final RFC Determination**

21 It is well settled that the ALJ is "responsible for determining
 22 credibility, resolving conflicts in medical testimony and for
 23 resolving ambiguities," in these proceedings. *Richardson*, 402 U.S.
 24 at 400; *Andrews*, 53 F.3d at 1039; SSR 96-8p. The final
 25 determination regarding a claimant's ability to perform basic work
 26 is the sole responsibility of the Commissioner. 20 C.F.R. §
 27 416.946; SSR 96-5p (RFC assessment is an administrative finding of
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1 fact reserved to the Commissioner). Further, where ALJ's
2 determination is a rational interpretation of the evidence, the
3 court will not substitute its judgment for that of the Commissioner.
4 *Tackett*, 180 F.3d at 1097. As discussed above, the ALJ's evaluation
5 of the evidence and credibility determination are supported by
6 substantial evidence. Although the evidence may be susceptible to
7 another interpretation, the ALJ's interpretation is reasonable and
8 must be upheld. *Id.*

9 Plaintiff's argument that the ALJ's failure to include
10 limitations propounded by Plaintiff's counsel at the hearing is
11 legal error is without merit. An ALJ is not obligated to include
12 limitations presented by counsel if they are not supported by
13 substantial evidence in the record. *Osenbrock v. Apfel*, 240 F.3d
14 1157, 1164-66 (9th Cir. 2001). As discussed above, other than
15 Plaintiff's properly discounted statements, there was no evidence
16 that headaches due to high blood pressure and/or fatigue caused
17 significant limitations in Plaintiff's ability to work. Therefore,
18 the ALJ did not err in his final RFC determination.

19 **CONCLUSION**

20 The ALJ's ultimate findings of non-disability are based on
21 substantial evidence from the entire record and free of legal error.
22 Accordingly,

23 **IT IS ORDERED:**

24 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 12**) is
25 **DENIED**.

26 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 16**) is
27 **GRANTED**.

3. Judgment for the **DEFENDANT** shall be entered. The District Court Executive is directed to enter this Order, forward copies to counsel, and thereafter shall close this file.

DATED October 30, 2008.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE